

8611

No.

Supreme Court of Illinois

Edmond Howett

vs.

James Monical

71641  7

No 18

Nov. Term 1860

Howett

vs

Monical

error to delay

Rev. & Remanded

8611

State of Illinois
Clay County

^{and no proceedings}
Pleas, had before the Honorable
Alfred Kitchell, Judge of the twenty-
fifth Judicial Circuit of the State of
Illinois, including the County
of Clay, in the case of Edmund
L. Howet Complainant and
James Monical defendant

Be it Remembered that on the 18th day
of October A.D. 1859, Edmund L. Howet
filed in the office of the Clerk of the Circuit
Court of Clay County Illinois, his bill
to foreclose mortgage against James
Monical, in the words and figures fol-
lowing, to wit;

State of Illinois } October Term of the Clay
Clay County } Circuit Court A.D. 1859.

To the Hon Alfred Kitchell Sole
Judge of the Judicial Circuit
including the County of Clay

Humly complaining sheweth unto
your Hon Court your Orator Edmund
L. Howet, of the County of Clay in the State
of Illinois; that heretofore to wit; on the twenty
second day of September, in the year of our
Lord one thousand eight hundred and

fifty seven, one James Monical, being indebted to your orator in the sum of twelve hundred and thirty three dollars and sixty cents to secure the payment to the said Edmund S. Howard of said sum, with the interest at the rate of two percent until due, and if not paid at maturity to draw interest at the rate of twenty percent after due. Executed a deed of Mortgage to the said Howard, whereby in consideration of said sum of twelve hundred and thirty three dollars and sixty cents, the said James Monical, bargained and sold unto said Edmund S. Howard his heirs and assigns forever the following described tracts of land, situate in said County of Dela. to wit the West one half of the North West quarter of section six Township two North, Range six East, the North East quarter of the North East quarter, of section one, Town two North Range five East the South one half of the South East quarter of section thirty six, Township three North, of Range five East, and the South West quarter, of the North East quarter of section thirty Township three North of Range six East, containing in the aggregate two hundred and fifty two acres. The above mentioned conveyance however, was subject to the following

condition, to wit; that whereas the said
James Monical, Executed to the said Edmund L.
Hornet his promissory note of even date herewith,
for the payment of the following sum of
money, at the time following to wit: twelve
hundred and thirty three dollars and sixty cents
on the twenty second day of September A.D.
1888. with interest at the rate of ten percent, and
it was specially agreed between the parties by
the terms of said Mortgage, that is the
said Mortgagor neglected or failed to pay
said Mortgage or sum of twelve hundred and
thirty three dollars and sixty cents at the time
the same becomes due and payable, then the
said James Monical shall pay to the said
Hornet the said sum of two hundred and
forty six dollars and seventy cents liquidated
damages for each and every year he retains
said money or neglects or refuses to pay the
same or at the rate of twenty percent until
paid, then these presents to be void, otherwise
to remain in full force and effect.
Your orator would further show that the
said James Monical has never paid the
said sum of money in the said promissory
note in the foregoing clause of default
mentioned, but the said sum with the
interest is yet due and is unpaid and
unpaid. Wherefore in consideration of

the premises your orator would pray that
 the Peoples writ of summons issue &c. and
 that the said James Monical be made de-
 fendant to this bill and that he be compelled to
 answer fully the matters herein contained or
 if particular interrogated in relation thereto
 but the oath of said defendant is hereby ex-
 pressly waived to said answer. And your
 orator would further show to your Hon-
 ourable Court that afterwards to wit; on the
 tenth day of June A.D. 1859. Certain differ-
 ence in various matters of dealing had
 sprung up between the said James Monical
 & your orator. It was agreed by certain
 articles of agreement under seal signed by
 said Monical as well as your orator, that
 all matters of difference both in law and
 Equity, either of a partnership or individual
 nature should be submitted to the arbitram-
 ent of W. W. Willard, B. B. Smith and
 such person as they might select as umpire (in
 case they could not agree as arbitrators, and
 that their award upon the case should be
 final in the premises. Your orator shows that
 in pursuance of said agreement the said W. W.
 Willard B. B. Smith entered upon said busi-
 ness and selected Jackson P. Hengate as umpire
 and after investigating all the matters of
 difference existing between the said parties

The said Monical & your orator, They the said arbitrators made their said award in writing and delivered to the said parties according to the terms of article of agreement, made between the said Monical & your orator, your orator further shows, that the said arbitrators awarded amongst other things, that the said James Monical pay to your orator the said note mentioned in the foregoing clause of Refuzance and that the Mortgage on the 1st day of October A.D. 1859 fully and completely according to the tenor and effect of the said note and mortgage which sum the said arbitrators by their award on the 14th day of July A.D. 1859 found to be fifteen hundred and fifty eight dollars & eight cents and your orator shows that the time fixed by the said arbitrators according to the terms of their said award for the payment of the said note and mortgage has long since expired before the filing of this bill yet the said James Monical has not paid the said note mortgage & interest found to be due by the said arbitrators, but that the same is yet due and unpaid, and your orator prays that the said Mortgage note and the award of the said arbitrators be filed and marked respectively A, B & C & entitled be made part of this bill and upon a final hearing of this cause Your Court order

do and adjudge that the said defendant
pay to your orator what may be found to be
due and owing to him upon the said Mortgage
Security within a short time to be fixed by
this Hon Court and that in default thereof
of the equity of redemption of the said
defendant and all persons under him in
and to the above described premises be forever
barred and foreclosed and that the same
be sold and the proceeds so far as necessary
be applied to the payment of the said sum
due your orator and that a commissioner
be appointed to make said sale and to
execute a deed to the purchaser thereof and
that your Hon Court grant such other
and further relief in the premises as may
appear to Equity good justice to belong
as in duty bound your orator will
ever pray &c. E. F. Horvath atty
Per Dec

and the said Complainant here files
a copy of the note
\$1233.60

Twelve months after date for value
received I promise to pay Edmund S. Horvath
to the sum of twelve hundred and
thirty three dollars and sixty cents
with interest at the rate of two percent

per annum being for money loaned
Sept 22^d A D 1857
Signed $\frac{1}{2}$ James Monical

Upon the back of which bill is the
following filing to wit;

Filed October 18th 1857

J. P. Hemmatt Clerk

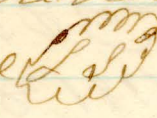
Copy of Mortgage filed by complainant
with bill of foreclosure &c.

This Indenture made the twenty second day of
September in the year of our Lord one thousand
eight hundred and fifty seven, between James
Monical of the County of Clay and State of
Illinois of the first part and Edmund S. Hew
it of the County and State aforesaid of the second
part. Witnesseth that the said party of the
first part in consideration of the sum of twelve
hundred and thirty three six cents lawful
money of the United States to him in hand
paid, the receipt of which is hereby acknowl-
edged both granted, bargain, sold, aliened
remised released and conveyed, and by these
presents doth grant, bargain sell, alien, remise
release, convey and confirm, unto the said party of
the second part and to his heirs and assigns
forever, all of the following described tracts
or parcels of land, to wit; The West one half

of the North West quarter of Section Six
 Town Two North of range Six East, the North
 East quarter, of the North East quarter of section
 one town two North of Range five East. The
 south one half of the south East q^r of section
 thirty six Town Three North of five East
 and the South West q^r of the North East quarter
 of section thirty town three North of Range
 Six East containing in the aggregate two
 hundred and fifty two acres, together with
 all and singular the tenements, heredita-
 ments and appurtenances thereunto
 belonging or in anywise appertaining
 and the reversions and reversions, remain-
 ders rents and profits thereof, and also all
 the estate right title and interest whots^{ever}
 either in law or Equity of the said party of
 the first part of in and to the same,

Do have and to hold the above granted prem-
 ises, with the appurtenances, unto the said
 party of the second part his heirs and assign-
 us to him and there own proper use and
 behoof forever. Provided always and these
 presents are upon this condition that
 if the said party of the first part shall
 well and truly pay his certain promissory
 note bearing even date herewith given
 to the said party of the second part for the
 sum Twelve hundred and thirty three

Dollars and sixty cents bearing interest at the rate of two percent per annum made due and payable twelve months after date; according to the tenor and effect of said note, then these presents shall be void otherwise to be and remain in full force and virtue and it is further agreed by and between the parties the said Mortgagee and mortgagee that if default be made in the payment of said sum of money, in said promissory note mentioned at the time it becomes due, to wit; one year from date the said James Monical is to pay to the said Thornt or to his assigns the sum of two hundred and forty six Dollars and seventy cents as liquidated damages for each and every year he retains said money or at the rate of Twenty Dollars per hundred per annum until said money is paid. In witness whereof the said party of the first part to these presents has here to set his hand and seal the day and year first above written.

James Monical 

Signed sealed and delivered in
presence of. Daniel Fields

State of Illinois }
Clay County } s. Daniel Fields a
Justice of the Peace in and for said
County do certify that James Monical whose

signature appears to the foregoing Mortgage and who is personally known to me to be the person who signed and executed the same did acknowledge the same to be his free act and deed

Given under my hand and seal
This 23^d day of September A.D. 1887

Daniel Fielus J. P. Seal

Upon the back of which mortgage is the following certificate to wit;

Filed for Record the 25th day of
September 1887 & duly recorded
January the 8th day A.D. 1888 in
Mortgage record A. pages 270

& 271 J. P. Hemmings Recorder
"Exhibit B"

The following is a copy of an award
filed in the foregoing cause and made
part of complainant's bill marked
"Exhibit C" to wit;

To all to whom these presents shall come we
W. W. Willard, B. B. Smith and Hemmings
send greeting Whereas heretofore, to wit on
the 10th day of June 1887 certain articles of agreement
under seal were made concluded and agr
eed upon between E. L. Howard of the County
of Dela and state of Illinois of the one part
and James Morical of the County and state
of Illinois of the other part, by which said

articles of agreement it was agreed among
other things, That whereas various matters
in law and equity and dispute have arisen
between Edmund S. Horner & James
Monica of said County and State in and
growing out of various dealings between
them as partners and individuals, and whereas
the said parties in a mutual spirit of am-
ity and goodwill have resolved and
deliberately agreed to submit and by these
presents did submit all such matters in
dispute between them as aforesaid to
the arbitration of the said W. W. Miller
and B. B. Smith of the County of Marion
and State aforesaid and did agree that
the said arbitrators should have power
to fix the time and place in said County
of Clay for the arbitration of the matters
aforesaid and should have power to exam-
ine all the books and accounts of the said
parties and demand the same of either of said
parties and should summons to appear before
them all such witnesses as should be named
by either of said parties and continue in
session from day and from time to time
until they should finally dispose of all
such matters, aforesaid as should be
submitted to them by said parties or
either of them and whereas they further

stipulated and agreed in said articles that
 if said arbitrators should not be able to
 make an award in the premises, then they
 were by said articles of agreement empow-
 ered to choose some citizen of the said com-
 munity of lay to be agreed on ~~between~~ said
 arbitrators as umpire and whereas the said
 parties and each of them did by said arti-
 cles of agreement bind themselves their heirs
 and assigns that they and each of them
 would well and truly keep and perform
 whatever the said arbitrators or any
 one of the said arbitrators and the
 person so called as umpire should
 agree upon and award in writing
 in the premises, which award it was
 further agreed should be final and con-
 clusive of all matters there in dispute or
 difference between the said parties in all
 the rights, duties and relations of life and bu-
 siness of whatsoever kind and character
 And whereas it was further agreed that the
 said arbitration should be had between the
 10th day of June 1859 and the 15th day of July
 next ensuing and that the award aforesaid
 should be made in writing and a copy thereof
 delivered to each of the said parties. And whereas
 the above named W W Willard and B. B. Smith
 after having first been duly sworn, avowing

to Law entered upon the arbitration as
in said articles of agreement provided and
having been unable to agree on some mat-
ters presented to them, they did choose
and procure the said Hemgate as umpire
as aforesaid. Now therefore know you that
we having examined the books and accounts
and having heard the proofs and allegations
and arguments of counsel of the said sev-
eral parties do award as follows to wit;
that the partnership heretofore existing be-
tween James Monical and Edmund S.
Howet under the name and style of
Monical and Howet in the town of
Louisville Clay County State of Illinois
is hereby dissolved and determined, and we
find the firm to be indebted to Day and
Meatlack a firm doing business in the
city of Cincinnati Ohio, in the sum of
nineteen hundred thirty seven Dollars and
sixty nine cents; To Lewis Dorschner in the
sum of two hundred forty Dollars and
forty seven cents; To Heasaltine McFarline & Co
one hundred twelve Dollars seventy one cents
To Nathan and Estab one hundred two dol-
lars forty five cents. To C. F. Craft & Co
twenty Dollars and forty eight cents. To J. P.
Hemgate three Dollars & twenty five cents.
To J. & W. McDowell Three hundred ninety nine

Dollar and fifty nine cents; To Peter Veff
 & son three hundred thirty six Dollars and thirty
 cents, making thirty one hundred eighty Dollars
 and ninety two cents, being the entire indebted-
 ness of said firm. And that we do award
 and adjudge that the said Edmund L. Howet
 do pay and discharge the said debt of nine-
 teen hundred thirty seven dollars and sixty
 nine, of Day and Maltack and that the
 said James Monical pay and discharge the
 following debts to wit; To Lewis Dorsheimer
 two hundred forty Dollars, and forty seven cents,
 and to Hassettine, M^r Fortin & Co one hun-
 dred and twelve dollars and seventy
 one cents; To Nathan & Estab one hundred
 ten Dollars and forty five cents; To E. H.
 Croft & Co. twenty Dollars and forty eight
 to J. P. Kermgate three Dollars and twenty
 five cents. To J & W M Dowell three
 hundred and ninety nine Dollars
 and fifty, nine cents. To Peter Veff &
 son three hundred thirty six Dollars
 and thirty cents making in amount
 twelve hundred twenty three Dollars
 and twenty five cents, and that the said
 Edmund L. Howet shall take and receive
 the following judgments and claims, due
 to the said Monical & Howet to wit; one
 judgment on C. J. Vazant of \$321.81 one on

Esau Creech of \$45.13, one on Leab Odell
\$10.30, one on James Pierson of \$33.88. Book
amount on Joseph Martin of \$4.48. Note on
A. B. Dye of \$38.60 also an amount on A. B.
Dye of \$18.20 amount of James Dye of \$16.70
Note on Henry R. Veff \$31.20. Note on Dillon
Brooks of \$21.58, judgment on Charles Riggs
of \$16.84. Note on Henry Kenley of \$17.04
amount on John Martin of \$6.80, judgment
on Joseph Holt of \$37.33. judgment
on John Hardy of \$10.35 in considera-
tion of \$714.42 which the said Horner
pays off. The firm indebtedness over and above
the amount awarded to the said Municipal
to pay. And it is further adjudged and dec-
ared that the said firm of Municipal and
Horner is indebted to the said Edmund
S. Horner in the sum of \$161.16 and that
he take and receive in full discharge of said in-
debtedness the following claims due to said firm
to wit; amount on A. G. Barnes \$7.40, amount
on James Moore \$57.88 amount on S. C. Sparks
of \$27.42, amount on Hardy Veff of \$15.00 amount
on J. F. Miller \$2.50 amount on Benjamin Foble
\$2.65 amount on Polly Bible \$5.11 amount on B. B.
Apperson 50 cts. judgment on Daniel Chandler
\$18.61. judgment on C. J. Dargand \$17.28, account
on John Williams \$4.90. And that the remainder
of the notes judgments and amounts of said

firm be equally divided between the said James
 Monical and Edmund S. Hoivet, and that
 each party shall have full power to use the
 the firm name in any suit or suits for the
 collection of said claims. And the said
 James Monical shall receive the following
 notes judgments and amounts for his share
 one judgment on James Esterton \$48.77, judgme-
 nt on J. B. Morris \$18.73, judgment on Benjamin
 Jones \$31.58, C. Leach judgment \$6.40, Risley
 judgment \$4.00, Jacob Rinehart judgment
 \$8.60, Philip Rinehart judgment \$8.47, i. s. p.
 Kepton judgment \$22.07, J. Kenley judgment
 \$6.84, John Tucker judgment \$1.00, J. Adams \$10.40
 J. Brown judgment \$1.00, G. Shotton judgment
 \$11.42, A. Kepton judgment \$6.60, John Higginbotham
 judgment \$10.80, John Darlee judgment \$2.45, Jonathan
 Blair judgment \$17.66, J. Beasley judgment
 \$8.25, Jacob Westfall judgment \$2.76, C. S. Edm-
 on judgment \$1.83, note on Isaac Pugh \$14.50
 Wm. R. Kenley note \$8.00, Isaac Thorton note
 \$34.00, J. M. Davis note \$7.00, Chadotte Maynard
 \$18.58, Samuel Lockard note \$4.00, amount on
 Daniel Bryan \$4.70, Note on Samuel Lockard
 \$7.41, Henry Mege amount \$1.70, Ann Monical
 amount \$2.15, Theodore Regley amount \$24.93
 Albert Rader amount \$2.00, J. M. Davis amount
 \$1.46, James D. Perron amount \$8.38, Jacob
 Loral amount \$11.00, John Sapp amount \$4.00

Elijah Leach amount \$5.40, H. C. Miners
amount \$4.05, Benjamin Reynolds amount
\$20.55 James Williams amount \$1.55, Nelson
Bare amount \$25.30. Henry Sefton amount
85 cts, Henry Sefton amount 85 cts, Henry Hobbs
\$1.85. Dudley Pimons amount \$8.24, Jacob Rade
amount \$2.15, Elizabeth Sigler amount
\$5.60 Alexander Toppingfield amount
\$2.55, Widow Scott amount \$3.45, John
Odell amount \$10.61, John Hughes an-
ount .55 William H. Hughes amount
1.50, Samuel Lockhard amount \$1.30, Charles
Wilkinson, amount \$11.18, John Hickentation
amount \$10.80, Jose Maynard \$3.95, Risley \$3.25
Adam Finner \$2.40. J. L. Erwin \$4.50, John Sepp
\$2.75, Allison Lewis \$6.63, Isaac Williams 50 cts
James R. Speaks \$1.25, Isaac Jacobs 25 cts, Will-
iam Kenley \$7.75, S. D. Ford 50 cts, J. B. Morris
\$1.50, John Tucker \$2.00, J. Vandergriff 85 cts
David Stiles 15 cts, Charles Jones \$1.25, Elizabeth
Maynard \$1.50 John Cox 45 cts, Joseph Odell
\$4.85, which making in all of Monicals share
of assets \$561.85. And we further award and
decide that the said C. S. Thowet shall take
the following judgment, and amounts as his
share of the assets of said firm to wit, judgment
on William Thott \$13.25, judgment on
Joseph Odell \$7.53, judgment Noah White
\$7.84, judgment and amount on Levi Jones \$44.57

J. B. Gurner \$44.33, B. Sandretto \$16.30, M. J. Folmer
 \$40.10, Jefe Folmer \$8.60, J. Dillon \$2.40, Folmer
 \$3.85, J. C. Pinehart \$28.80, J. Maxrall \$4.90, M. J.
 \$1.60, D. Fitzgerald \$57.31, Peter Green \$46.13, J. A.
 Glenmire \$26.40, Wells Sandretto to 25 Henry
 Manning \$1.82, Jefe Baile \$5.50, John W.
 Speaks \$4.10, J. W. Sullivan \$1.40, Darling Song
 \$1.20, B. F. Lounds \$2.30, George Thorne \$13.92
 Thorne & Thaldeman 85 cts, James Wilkerson
 80 cts, M^{rs} H. Hawley \$3.25, Thomas Sireth
 \$4.85, Greenberg Lee Hart 30 cts, Elizabeth Golden
 25 cts, George Pierson \$5.21, M^{rs} Hellams 20 cts,
 John Edwards 23 cts, A. S. Lemay \$2.25, Perry Lee
 \$7.31, Elliptical Laundry \$19.00 M^{rs} Hughes 60 cts,
 Mary Hobbs \$7.50, James Maxrall \$1.31
 Erach Sireth \$8.80, Woodrow Bryan \$4.40
 John C. Jones \$9.60, Jefe Baile \$9.50, Mary Veff
 \$1.68, H. R. Veff 72 cts, John P. Davis \$1.52, John W.
 Davis 35 cts, Bramon Richardson 75 cts, B. Brewer
 \$3.72, Richard Hoke \$17.96, John Keeton \$1.60
 M^{rs} Keeton \$11.03, John Pinehart \$2.53
 John Bryan \$2.55, John Pinehart \$3.90, Frank
 Kenley ⁴ \$8.50, making in the whole \$562.70 as
 said Thorne's portion of assets, and we do
 further award and declare, that the said James
 Thorne is individually indebted to the said
 Edmund S. Thorne, separate and apart
 from said partnership matters heretofore
 determined, to wit, by note and Mortgage

\$1558.08, which we find to be due at the time
of rendering this award, said note is dated
Sept 22nd A.D. 1857 and secured by said Mortgage
on the farm of said Monical, and that the
said Monical is ^{jointly} indebted to said E. L. Thorne
on account \$288.80, which makes his individ-
ual indebtedness to said Thorne \$1846.88, in all
at this date, and we further award and declare
that the said James Monical, shall pay and
discharge the said note and mortgage to the
said Thorne, on the first day of October
A.D. 1858, fully and completely, according to
their tenor and effect, and the said Mon-
ical shall also pay the balance of said in-
debtedness to the said Thorne, with interest as of
overaid \$228.80 in twelve months from
the date of this award, with ten percent in-
terest thereon from this date, and we
further award that each party shall pay the
costs he has made in this arbitration and
that the costs of the award be paid in equal
moieties between them.

Given under our hands this 14th
day of July A.D. 1858.

W. M. Willard Seal *Willard*

B. B. Smith Seal *Smith*

J. P. Hingate Seal *Hingate*

Upon the filing of which bill the clerk
issued a summons against the said defen-
dant as follows to wit;

State of Illinois } ss;
Clay County } The People of the State of
summons Illinois, To the Sheriff of Clay County, Greeting:
We command you to summon James
McDonnell if to be found in your County,
to appear before the Circuit Court of Clay
County, on the first day of the next term
thereof, to be holden at the Court house in
Louisville, on the fifth Monday in the mo-
nth of October next, to answer a Bill in
Chancery for Foreclosure of Mortgage filed
in the office of the Clerk of the Circuit Court of
Clay County against him, by Edmund L. Ham-
mond. And thereof make due return to our said
Court as the law directs.

Witness J. P. Hengate Clerk of said
L.S. Court and the Judicial seal thereof,
at Louisville this 18th day of October
A.D. 1859. J. P. Hengate Clerk

Upon the back of which summons is the
return of service made by the Sheriff to wit:
"as commanded I have served this writ on
the within James McDonnell, by reading the
same to him & leaving a true copy of the
same with him on this the 19th day of October
A.D. 1859 B. F. Reynolds Sheriff"

On the 8th day of November A.D. 1869
The defendant by counsel files his dem-
urrer herein, which Demurrer is in the
words & figures following to wit;

Edmond S. Howet }
" } Demurrer
James Monical }

Demurrer and the said defendant
saying & reserving to himself all manner
of exceptions &c comes & demurs on law
to complainants & assigns the following
causes of Demurrer -

1st The bill upon its face shows that
relief was made and award
& the said award included the Mortgage
sought to be foreclosed. Whereby compla-
inant is driven to an action on the note
or on the subscription bond, but he
can not foreclose.

2d The Compts bill asks that Court
to decree to him various sums of money
and said bill is demurrable for many
other good causes &c

James Monical
Defendant
Griffin, Stephenson & Cooper
Sols for Defts

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Upon the back of said Demurrer is the following, to wit;

"Filed November the
8th 1859. J. P. Kemigate
Clerk"

And at the October Term A.D. 1859
of the Circuit Court in the county
of Clay and State of Illinois the fol-
lowing proceedings were had, to wit;

9th Day

"

E. L. Howard

"

Foreclosure

1st
Order

James McConical

Now on this day comes
the defendant by his attorneys and files
a Demurrer to Complainant's bill
and after hearing arguments from
counsel upon the issue joined upon the
Demurrer, and the Court being not suf-
ficiently advised took time &c.

And at the March Special Term A.D.
1860 of the Clay Circuit Court Illinois
in the aforesaid cause the following
proceedings were had, to wit;

14th Day

52

Edmond L. Howard

"

Foreclosure

2d Order

James McConical

On this day, it is ord-
ered by the Court that the Demurrer to bill

herein filed at the last term of this court
by the defendant & taken under advisement
by the court until this term of court be sus-
tained, to which sustaining of sentence
the complainant excepts &c
It is further ordered by the court that the
complainant's bill herein be dismissed
&c.

State of Illinois } ss
Clay County }

J. P. Hemgate clerk of
the circuit court of Clay County hereby
certify that the foregoing is a true &
correct transcript of all the proceedings
had in the circuit court of said County
that all the papers have been correctly
copied, as appear of Record & on file
in the case of Edmund S. Thomet com-
plainant & James Monical defendant
given under my hand and
official seal at Louisville
this 21st day of August A.D.
1868 J. P. Hemgate clerk

Clerks cost	\$13.20
Sheriffs "	1.60
	\$14.80

E. D. Howard vs. James Monical
 And the said plaintiff in error assigns
 the following as causes in error.
 1st The Court erred in sustaining said
 defendants demurrer to Complainants
 Bill.
 2^d The Court erred in dismissing com-
 plainants bill.

C. Beecher, Atty
 for Plff. in error.

And the said Defr in error by
 Stephenson & Cooper his Atty comes & says
 that there is no error in the said
 record
 Stephenson & Cooper & Griffin
 for Defr in Error

Error to Henry Co.
 18

E. D. Howard

vs.
 James Monical

Transcribed

Replied per \$13.20
 Sheriff \$1.00
 \$14.20

John Carter & Co. Secs
 N. Stephenson Atty
 Paid by J. Carter & Co. \$5.00

Edmond S Howett Plff in Error
vs
James Monical } Deft in Error

Argument of Deft in Error

The only point upon which the decision of the Court below is questioned is whether the award made by the Arbitrators (a copy of which is filed and made a part of the Bill) merges & extinguishes the mortgage security & the right to foreclose said mortgage. The award as filed shows the following action ^{by the Arbitrators} upon the mortgage now sought to be foreclosed by the Plaintiff in Error

" That the said James Monical is indebted
" to Ed Howett apart from partnership
" matters to wit by note & mortgage
" \$1558.08 which we find to be due
" at the time of rendering this award
" & also (going on to describe the mortgage)
" & also that said Monical is further in-
" debted to said Ed. Howett on account
" \$288.80 which makes his individual
" indebtedness to said Howett \$1846.88
" in all to this date " & awarded

that the said James Monical
Should "discharge & pay the said
note and mortgage to the said
Ed Hower on the 1st day of October
AD 1859 according to their tenor
and effect" & then award as
what sum the \$288.80 shall be
paid. The point was raised
in the Court below on demurrer
to the Bill the Court sustained
the Demurrer and dismissed
the Bill. as we think upon
sufficient grounds

It has been the well set-
tled Law of the Land for years
conformed by a long train
of decisions by nearly every
Court in this Country & in
England that a valid
award merges & extinguishes
the original contract and
destroys the right of the party
to sue thereon. In this case
altho not appearing from
evidence the facts were set up
by the complainant himself
and are patent upon the

face of the Bill and the advantage
was therefore properly taken by
demurrer -

The general rule of Law above
stated cannot be seriously ~~stated~~
disputed the only question can
be whether this case comes
under this general principle
The note is the contract to pay
the money the mortgage a collateral
security they were fully submitted
to the arbitrators and awarded upon
by them in connection with other
individual indebtedness between
the parties The arbitrators acted it
appears from the award & from the
note & mortgage that the note
was due awarded that the
Defendant should pay the amount
then due by Oct 1st 1859 thereby
changing the time of payment
from the time mentioned in the
note and creating a new indebted-
ness and of a new character
merging the remedy on the note &
mortgage & creating a new one
upon the submission bonds or
the award But considering the

mortgage as a mere security
can that security be enforced
& foreclosed when the debt which
it was given to secure is
merged by an award and is now
the security itself merged in and
extinguished by the submission
and award. One great end of
Arbitrations is certainly to put
an end to litigation between the
parties or at least to reduce
all causes of action to one
& thereby prevent the multiplicity
of suits. This is attained by
the award of the arbitrators
and would be violated were
the parties allowed to disregard
the award and to enforce the
original contracts and securities.
~~now~~ Would it be contended
that the note in this case
could have sued upon in
an action of Assumpsit & the
suit maintained in the face of
the award certainly not. Would
it be contended that if there
had been personal securities
upon the note that they could

have been held liable and
a judgment obtained against
them upon that note after it
had been passed upon by and
included in the award and
if personal securities could
not be held how can the real
estate security - they stand upon
the same footing. But it may be
said that on account of the ex-
pression in the award that the
note and mortgage shall be
discharged and paid "according
to their tenor and effect" that there-
by the arbitrators intended that
the mortgage security should
remain, & that it still remains
unchanged & with a simple as-
certainment of the amount due
The farthest that any case we have
been able to find goes upon this
question in favor of the Plaintiff in error
is that where a note or written
instrument is submitted to
arbitrators especially to ascertain
the amount due then that the
party may sue in debt and the

amount settled by the arbitrators shall be conclusive evidence of the amount due. The parties in this case submitted all matters in controversy including this mortgage & note to arbitrators - those arbitrators in fulfilling their duty were not confined to the mere ascertainment of the amount due but were fully authorized to make any and all awards or dispositions in the premises as they from the law and evidence might deem proper. They as it is true ~~computed~~ the amount then due upon the note as was & would have been their duty in any case where no sufficient defence had been made to the note but they not only did this but also made a change in the time of payment of that amount as was undoubtedly their right to do for this award is taken for the purposes of this suit to be a valid award by both parties.

then their saying that the note
& mortgage should be discharged
and paid by Monical on the
1st day of Oct 1859 according
to their tenor and effect
can only refer to the rate of
interest to be paid by said
Monical the tenor and effect
of the note & mortgage was that
it should be paid at a
time previous to the arbitration
it of course then was impossible
for Monical to pay according
to the tenor & effect of the mortgage
in that respect by paying it
according to the award in
October 1859 some time after the
mortgage became due in order
then that all parts of the award
may stand & construing it ac-
cording to its true intent and
meaning it is evident that the
expression "tenor and effect" can
only apply to the rate of interest
the time being changed and the
amount due fixed by the
award. all matters as well
in equity as in Law were sub

mitted to the arbitrators, this
mortgage among the others
The Plaintiff in error has a full and
perfect remedy upon the submission
bond & award. He has merged
his note and mortgage lien in
the arbitration & must rely
upon it for all subsequent
remedy.

Tervis vs Tervis	4 Monroe (Ken)	47
Armstrong vs Masten	11 Johnsons	189
Bulkley vs Stewart	1 Day	130
Homes v Aery	12 Mass	134
Brazil v Isham	2 ^d Kernan	1

These cases appear to us fully
decisive of the point, especially
the last named a late decision
of the New York Court of Appeals

Oliphenson & Cooper
& Griffin
for Debt in Error

E. L. Howett
Left in Error

James Morrical
Left in Error

Argument of
Left in Error

Stephenson
Cooper
Brighton
Left in Error

State of Illinois,
SUPREME COURT,
First Grand Division.

} ss

The People of the State of Illinois,
To the Sheriff of Clay County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Clay county, before the Judge thereof between

Edmond S. Howett plaintiff and

James Monical defendants it is said that manifest error hath intervened to the injury of said Edmond S. Howett as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said James Monical

that he be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at Mount Vernon, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said James Monical notice together with this writ.

WITNESS, the Hon. John D. Catron Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eighth day of October in the year of our Lord one thousand eight hundred and sixty.

Noah Johnston

Clerk of the Supreme Court.

SUPREME COURT.

First Grand Division.

Edmond L. Howard

Plaintiff in Error,

VS.

James Moniceal

Defendant in Error.

SCIRE FACIAS.

FILED.

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Ad by Howard

as recommended have been this not upon the
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Book & return having the over head and
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October 18th 1860

D. J. Reynolds
Jury
of Key County

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-161

In the Supreme Court of the State of Illinois.
FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

EDMOND L. HOWET,

vs.

JAMES MONICAL.

Error to Clay.

ABSTRACT AND BRIEF FOR PLAINTIFF IN ERROR.

This was a bill filed by plaintiff in error to foreclose a mortgage.

- 1] The bill sets out a note and mortgage executed by defendant to plaintiff September 22, 1857.
- 4] Alleges that on June 10, 1859, the parties submitted all their matters, including partnership and individual dealings, to arbitrators.
- 19] That said arbitrators awarded, among other things, as follows: "We further award that the said James Monical shall pay and discharge the said note and mortgage to the said Howet on the first day of October, 1859, fully and completely according to their tenor and effect."

Alleges that such time has elapsed, and the note and mortgage are not paid.

- 21] Defendant filed a demurrer to this bill which was sustained by the Court and the bill dismissed.

Plaintiff assigns for error—

1. Sustaining the demurrer.
2. Dismissing the bill.

BRIEF OF PLAINTIFF.

It is claimed by defendant that the award extinguished the right to sue on the original cause of action, and that the only remedy is in an action at law on the award or on the arbitration bond.

We assert the law to be, that when the award creates a *new duty or right*, instead of that which before existed, the suit must be on the award; but when it does not *change* the original liability the *remedy* is not changed. This doctrine is fully sustained in *Freeman vs. Bernard*, 1 Raymond's Rep., 247; S. C. 1 Salkeld, 69; 12 Modern, 130. This case is cited at length without objection in *Armstrong vs. Masten*, 11 Johns., 189. Russell on Arbitrations, page 503-4.

And in a late case this doctrine is fully examined and sustained. *Brazell vs. Isham*, et al, 1 E. D. Smith's Rep., 437.

But aside from this, the equity is clearly with the plaintiff. Here is a fund out of which this debt was originally agreed to be paid. The arbitrators award that it be paid according to the original contract, extending only the time. Indeed this was not one of the subjects of controversy; about it there was no dispute. Will a court then say the complainant shall collect his debt of the securities of the defendant, and leave them the uncertainty of saving themselves out of other property of the defendant, when here is a fund out of which he may have direct relief?

E. BEECHER, for Plaintiff in Error.

C. L. Hewitt

vs.

James Monro

Abstract & Brief.



NOTES FOR THE YEAR 1880

FIRST SUPPLEMENTAL VOLUME

In the Supreme Court of the State of Illinois.

State of Illinois,
SUPREME COURT,
First Grand Division.

} ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Clay Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Clay county, before the Judge thereof between

Edmond L. Howett plaintiff and

James Monical defendants it is said manifest error hath intervened to the injury of the aforesaid Edmond L. Howett as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the 1st Sunday after the 2^d Monday of November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. John D. Catton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eightth day of October in the year of our Lord one thousand eight hundred and sixty.

Mark Johnston
Clerk of the Supreme Court.

SUPREME COURT.

First Grand Division.

Edmund L. Hewitt

Plaintiff in Error,

VS.

James Monical

Defendant in Error.

WRIT OF ERROR.

Issued & FILED - Carter

July 1860 -

N. Johnston

State of Illinois,
First Grand Division,
SUPREME COURT.

The People of the State of Illinois,

Greeting:

To the Clerk of the Circuit Court for the County of

Reason: Do the record and proceedings in and on the case

now on the judgment of a jury which was on the 27th day of

the said case, and the said judgment was rendered on the 27th day of

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E. BEECHER, for Plaintiff in Error.

E. V. Horner
v.
J. Morice

Abstract.

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Coffin

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RECORDED JAN 11 1890

DEPT. OF THE DISTRICT, V. L. MORICE, LEXON

IN THE SUPREME COURT OF THE STATE OF ILLINOIS



Received, Mt. Vernon Ill. Nov. 18. 1860. of E.
Becker Esq. Two Dols in full of printing
Brief in case of Hewitt vs. Monical
Russell & Wall.

\$2.00